United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1019

To be argued by
JOHN TIMBERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1019

UNITED STATES OF AMERICA,

Appellee,

—v.—

BIENVENIDA MARTINEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

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United States Court of Appeals

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BIENVENIDA MARTINEZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Bienvenida Martinez appeals from a judgment and conviction entered in the Southern District of New York on November 14, 1973, after a two-day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 73 Cr. 842 filed September 4, 1973, charged Martinez in four counts with forging and uttering endorsements on two United States Treasury checks, in violation of Title 18, United States Code, Section 495.

The trial commenced on November 13, 1973. On November 14, 1973 the jury found Martinez guilty on Counts One and Three, the forging counts.*

On December 28, 1973, imposition of sentence was suspended, and Martinez was placed on probation for two years on each count concurrently.

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* No decision was reached on Counts Two and Four, the uttering counts, and these counts were dismissed on December 28, 1973 at the time of sentence.

Statement of Facts

A. The Government's Case

Around December 3, 1971 two United States Treasury Social Security disability checks in envelopes addressed to Bessie Donald arrived in the mail at the apartment of Martinez' sister, Georgina (Tr. 13-15, 52, 66-67). The payee, Mrs. Donald, had recently moved out of the apartment in which Georgina lived. Georgina gave the two checks to Martinez, who took them to her bank, the Bankers Trust Company branch at 94th Street and Broadway in Manhattan, on December 6, 1971 (Tr. 28-29, 40, 52). At the bank Martinez forged * Bessie Donald's signature on the backs of the two checks and deposited the proceeds of the checks in her own savings account (Tr. 31, 66; GXs 1, 2, 4 and 6 and DX B).

On December 14, 1971 Martinez withdrew the proceeds of the checks from her savings account (Tr. 46; DX B).

Subsequently, Martinez admitted to Government officers that she had deposited the two Treasury checks in her account (Tr. 52, 57-58; GX 10).

B. The Defense Case

Martinez testified in her own behalf at trial and contended that she forged the endorsement and deposited the checks in her savings account so that she could return the money to the payee when the payee was found (Tr. 66 and 81). However, Martinez testified to no effort to locate Mrs. Donald although Mrs. Donald had only recently moved out of Martinez' sister's apartment. The defense contended that it was ignorance that led Martinez to select this course of action as a way of preserving Mrs. Donald's money (Tr. 90, 98-99). However, Martinez admitted that she realized it was wrong to forge and deposit the checks; that she had been a

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* Bessie Donald testified that she had not authorized Martinez to endorse the checks (Tr. 16).

school teacher in the Dominican Republic; that she had been in the United States approximately three to four years at the time of the forgery; and that while she had been in the United States she had held several jobs and had frequently received and cashed checks (Tr. 64, 71, 72-76).

ARGUMENT

The claim of error in Judge Bonsal's charge was not preserved below and, in any event, is without merit.

Martinez' sole claim of error is that the portion of Judge Bonsal's charge on credibility of witnesses that dealt with a defendant's interest was erroneous because (1) it implied that, as a general rule, a defendant's interest precludes truthfulness and (2) it misled the jury into believing that it could not accept a part of a defendant's testimony while rejecting another part. However, the objection now raised was not adequately preserved below and, in any event, the claim is without merit.

First of all, the exception by Martinez's counsel to the trial judge's charge on the defendant's interest and credibility was insufficient. Rule 30 of the Federal Rules of Criminal Procedure requires that, to preserve a claim of error with respect to a portion of the charge to the jury, defense counsel must object "thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects *and the grounds of his objection*" [emphasis supplied]. Here, all that defense counsel said about this portion of the charge was:

> "Mr. Curley: I except to the court's charge of interest on behalf of the defendant.
>
> The Court: You have an exception to that" (Tr. 125).

While defense counsel did take exception generally to the portion of the charge now said to be error, it cannot be

maintained that the grounds for the objection now articulated were specified, or in any way indicated, by the exception taken. Accordingly, the claim now made on appeal is barred. See *United States* v. *Valdes*, 417 F.2d 335, 338-339 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970).

On the merits, it is perfectly apparent that Judge Bonsal's charge on the interest of the defendant was not erroneous. Martinez attempts to make a case for error by quoting a single paragraph from the charge on the credibility of witnesses. When taken as a whole, however, as it must be, *e.g.*, *United States* v. *Rosa*, Dkt. No. 73-2324 (2d Cir., March 26, 1974), slip op. at 2351-2352; *United States* v. *Hernandez*, 361 F.2d 446, 447 (2d Cir. 1966); *Cupp.* v. *Naughten*, 42 U.S.L.W. 4029, 4030 (U.S., December 4, 1973), Judge Bonsal's charge, including the paragraph Martinez singles out, was not erroneous.*

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* The full text of Judge Bonsal's charge on credibility of witnesses was (Tr. 121-123):

> "You heard several witnesses for the government and Mrs. Martinez testify herself, and you, the jury, are the exclusive judges of the credibility of those witnesses. And of course it is the quality of the testimony, the testimony you think represented the true picture of what happened here, and in considering the credibility of these witnesses, ladies and gentlemen, again please use your plain, everyday common sense. You saw the witnesses on the stand. How did they impress you?
>
> "Did you think they are testifying frankly, candidly, and fairly?
>
> "So apply your common sense and experience just as you are called upon in determining an important matter in your own lives when you are called upon to decide whether you have been given a true picture of a given situation. I think you would take into account a witness' demeanor, or his background, occupation or business, a witness' candor or lack of it, a witness' possible bias, and you would consider whether a witness has been contradicted or supported by other credible testimony or circumstances.

[Footnote continued on following page]

Judge Bonsal's charge on the effect on a defendant's credibility as a witness of his interest in the outcome of his trial was based on authority as old as *Reagan* v. *United States,* 157 U.S. 301, 304-311 (1895), and, in this Circuit, as recent as *United States* v. *Sclafani,* 487 F.2d 245, 257 (2d Cir.), *cert. denied,* 42 U.S.L.W. 3290 (1973). See also *United States* v. *Mahler,* 363 F.2d 673, 678 (2d Cir. 1966); *United States* v. *Sullivan,* 329 F.2d 755, 757 (2d Cir.), *cert. denied,* 377 U.S. 1005 (1964); *United States* v. *Paccione,* 224 F.2d 801, 803 (2d Cir.), *cert. denied,* 350 U.S. 896 (1955); *Malofsky* v. *United States,* 293 F. Supp. 1122 (S.D.N.Y. 1968) (Weinfeld, *J.*). The charge Judge Bonsal gave differs from those in the cases cited because his statement of the strong interest a defendant has in the outcome of his trial was significantly less forceful than it might have been.* Moreover,

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"Mrs. Martinez took the stand. She obviously has a vital interest in this case, she is the defendant. And her interest is one of the matters that you should take into consideration in determining the credibility which you give to her testimony. You obviously should consider her testimony with great care. But of course you may conclude that Mrs. Martinez was telling the complete truth to you, despite her interest in the outcome of this trial.

"If you believe that any witness has been impeached or discredited then it is your exclusive province to give the testimony of that witness such credibility, if any, which you think it deserves. You can accept part of a witness' testimony if you believe it and you can reject the rest of it if you don't believe it.

"You should also consider the strength or the weakness of a witness' recollection. Sometimes a witness may have a weak recollection on the subject or a witness may be incapable of accurately setting forth what he or she observed or did."

* In *Sclafani,* for example, this Court approved a charge by Judge Palmieri which included the following language:

"As the defendant he has a personal interest in the result of the case and such interest creates a motive for false testimony. The greater the interest, the stronger the motive and the defendant's interest in the result of this trial is of a character possessed by no other witness. . . ."

(Appellant's Appendix at A-253 in *United States* v. *Sclafani*).

Judge Bonsal's statement that "But of course you may conclude that Mrs. Martinez was telling the complete truth to you, despite her interest in the outcome of this trial", upon which Martinez' attack appears to be most particularly focused, was perceptibly more favorable to Martinez than the charge approved by this Court, speaking through then Circuit Judge Marshall, in *United States* v. *Sullivan, supra* * Martinez argues that the asserted defect would have been cured if "the charge [had] assured . . . that the jury would evaluate the appellant's credibility on its own merits and that her interest was one factor to be considered" (Br. at 9). However, a reading of Judge Bonsal's full charge on witnesses' credibility (see *supra,* pp. 4-5 fn.) shows that he did just what Martinez contends should have been done.

Finally, Martinez also argues that the part of the charge cited in her brief may have misled the jurors into thinking they were not free to accept a portion of her testimony while rejecting another part. The trial judge did not say this, and it is difficult to see how a juror could have drawn the inference Martinez suggests. However, if a juror harbored any doubt on this point after hearing the part of the charge to which Martinez confines her attention, that doubt was surely dispelled when the trial judge charged (two sentences later) "You can accept part of a witness' testimony if you believe it and you can reject the rest of it if you don't believe it" (Tr. 122-123).

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* In *Sullivan, supra,* 329 F.2d at 756-757, the trial judge had charged the jury as follows:

> "In this case, the defendant testified. There was no obligation or compulsion of the defendant to testify, but when he takes the stand and does testify, he is tested by all the same rules and guides that any other witnesses are tested by. You know that, of course, the defendant is interested—vitally interested—in the outcome of a case, his case. That is not to say anyone who is interested in the case necessarily lies, but it is a fact you must take into consideration. A man that is interested in the outcome of a case might see things differently. You and I do it sometimes consciously and sometimes subconsciously. We see things differently when we are interested in an event."

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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3:30
Service of within
Brief is acknowledged
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